TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~210~~ 47

JAMES C. KENNEDY, AS RECEIVER OF THE MERCHANTS' NATIONAL BANK OF WASHINGTON CITY, APPELLANT,

vs.

PATRICK GIBSON, JOHN S. BARRY, LAWRENCE P. BAYNE, SUE L. HOUGH, OSCAR KING, AND THE NATIONAL MECHANICS' BANK OF BALTIMORE, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED DECEMBER 10, 1867.

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INDEX.

	Original.	Print.
Style of court	1	1
Bill of complaint	2	1
Exhibit A	11	5
B	12	6
C	13	6
D	16	8
Subpœnas	18	8
Do.	21	10
Do.	22	10
Marshal's returns	19	9
Do.	21	10
Do.	26	12
Demurrer	23	10
Decree	26	12
Agreement, &c	27	12
Appeal	28	13
Appeal	28	13
Clerk's certificate	31	14

1 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a Circuit Court of the United States for the fourth circuit, in and for the Maryland district, began and held at the city of Baltimore, on the first Monday in April, in the year of our Lord one thousand eight hundred and sixty-seven.

Present: The Honorable William F. Giles, judge Maryland district; Andrew Sterett Ridgely, esquire, attorney; Washington Bonifant, marshal; James W. Chew, clerk.

Among other were the following proceedings, to wit:

JAMES C. KENNEDY, receiver, &c.,
vs.
PATRICK GIBSON, JOHN S. BARRY, LAWRENCE P. Bayne, Sue L. Hough, Oscar King, The National Mechanics' Bank of Baltimore, John S. Carlisle, Josiah Colston, Frederick Colston, William Archer, Robert H. Archer, Thomas H. Osborn, Charles Clagett, Charles Goodwin, The President and Directors of the Franklin Bank of Baltimore.

2 Be it remembered, that heretofore, to wit, on the twenty-ninth day of June, in the year of our Lord one thousand eight hundred and sixty-six, the said James C. Kennedy, receiver, &c., by Robert J. Brent, esquire, his attorney, filed in the Circuit Court here, sitting as a court of equity, his bill of complaint, which is in the words and tenor following, to wit:

Bill of complaint.

[50-cent rev. stamp.]

To the honorable the Circuit Court of the United States in and for the district of Maryland, sitting in equity:

James C. Kennedy, a citizen of the city and State of New York, as receiver of the Merchants' National Bank of Washington, duly appointed and qualified under and by virtue of the fifteenth section of the act of Congress passed on the 3d day of June, 1864, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," brings this his bill of complaint against Patrick Gibson, a citizen of the State of Maryland; John S. Barry, a citizen of the State of Maryland; Lawrence P. Bayne, a citizen of the State of Maryland; Sue L. Hough, a citizen of the State of Maryland; Oscar King, a citizen of Maryland; The National Mechanics' Bank
3 of Baltimore, a corporation established and doing business and a citizen of the State of Maryland; John S. Carlisle, a citizen of the State of Maryland; Charles Goodwin, a citizen of the State of

Maryland; and Frederick Colston, William Archer, and Robert H. Archer, trading as Colston, Archer & Co., citizens of the State of Maryland; Thomas H. Osborn and Charles Clagett, the last two being citizens of Maryland; and the president and directors of the Franklin Bank of Baltimore, a corporation organized and incorporated under the laws of, and doing business of banking in, and a citizen of, the State of Maryland.

And thereupon your orator complains and says, that the Merchants' National Bank of Washington, being duly organized under and by virtue of the act of Congress entitled An act to provide a national currency, &c., passed on the 25th February, 1863, did proceed to issue and circulate currency, to receive deposits, discount notes, and generally to transact the business of a national bank; that in its business operations it incurred and contracted large liabilities, until on or about the 4th day of May, 1866, it was compelled to suspend all business operations because of its inability to meet its engagements and liabilities; that the said association did, on or about the 8th day of May, 1866, fail to redeem, in lawful money of the United States, one of its circulating notes when payment thereof was duly de-
4 manded during the usual hours of business, at the office of such association, and the same being duly protested by a notary public, notice thereof was forwarded to the Comptroller of the Currency, as appears by a copy thereof marked Exhibit "A;" that the said Comptroller becoming satisfied, by reason of said protest, that said association had refused to pay one of its circulating notes as aforesaid, and was in default, did thereupon appoint your orator receiver of all the property and assets belonging to the Merchants' National Bank, and required of him bond and security to be approved by said Comptroller, which bond and security your orator gave, and the same were approved by said Comptroller in due form of law, and of which will more fully appear by a copy of said appointment and bond, marked Exhibits "B & C," and made a part hereof; that thereupon your orator did, under the direction of said Comptroller, take possession of the books, records, and assets of every description of said association, and is now engaged in collecting the debts, dues, and claims belonging to said association, and in otherwise discharging the duties devolved upon him by law in the premises. And your orator has already ascertained that the assets and credits of said association are wholly insufficient to pay its debts and liabilities, and that it will be necessary to the complete and entire administration of the trust in him reposed, that recourse
5 shall be had to the personal liability imposed on the stockholders of said association, in and by virtue of said act of Congress approved on the 3d day of June, 1864, as well as by the aforesaid act of the 25th February, 1863.

Your orator further sheweth that two thousand shares of the capital stock in said association were duly issued by it, and he verily believes, from a careful examination into the condition of said association, and so believing charges, that it will be necessary for the payment of the just debts and liabilities of the said association to obtain

from said stockholders an amount of money equal to the full amount of all the stock so issued, according to its par value, and which your orator charges to be of the value and to the amount of two hundred thousand dollars; and your orator is advised, and charges, that he is entitled to have an account taken, as against said stockholders, of the amount of indebtedness due, or to be due, by said association, and the amount of its available assets and credits, and to recover from each of said stockholders individually, in proportion to the number of shares held by him, her, or it in said capital stock, equally and rateably, a contribution to the extent of the amount of stock held by him, her, or it, at the par value thereof, in addition to the
6 amount by him, or her, or it invested in said shares, for the purpose of making good and paying any deficiency or balance of the indebtedness of said association which may remain after the application of all the available assets and credits of said association to the discharge of said indebtedness.

And your orator avers and charges that after such application is made, a balance of indebtedness to its creditors will remain due and owing from said association, largely exceeding the said sum of two hundred thousand dollars, the par value, as aforesaid, of all its stock in the hands of said stockholders.

Your orator further sheweth that all of said named defendants, except the said Frederick Colston and William Archer, and Robert H. Archer and Thomas H. Osborn and Charles Clagett, and as hereinafter excepted, were, at the suspension and failure of said association, shareholders of its capital stock, or entitled to be such shareholders, to the amount respectively set opposite their names in the schedule hereto annexed, marked Exhibit "D," and made part hereof, said King being also entitled to fifty shares of said stock standing in the name of Josiah Colston, and the said Franklin Bank being entitled to the stock standing in the name of said Goodwin. And your orator avers that at the time of said suspension and failure
7 said named parties, or some of them, except as aforesaid, held in their possession or control the certificates of said stock, as in said schedule mentioned, and were stockholders in said association.

And your orator further avers and charges, that the National Mechanics' Bank of Baltimore, one of the defendants, although it was a banking association existing on the 3rd day of June, 1864, did not then have, or has now, five millions of dollars of capital actually paid in, and a surplus of twenty per cent. on hand, as the same may be determined by said Comptroller; but your orator charges that said National Mechanics' Bank is liable, as such shareholder, for the full amount of twenty thousand dollars, as aforesaid.

Your orator further showeth that the above-named, Thomas H. Osborne, Charles Clagett and Frederick Colston, William Archer and Robert H. Archer, trading as Colston Archer & Co., and each of them were formerly shareholders of stock in the said association in the amounts following, that is to say, Thomas H. Osborne, in the amount of two hundred shares, and Charles Clagett, in the amount of one hundred shares; Frederick Colston, William Archer

and Robert H. Archer, trading under the name of Colston, Archer & Co., in the amount of fifty shares; they also claiming other fifty shares of stock belonging to said Oscar King, and they and
8 each of them so remained such stockholders until they respectively had reason to believe that said association was in desperate and insolvent circumstances.

And your orator charges that the said Thomas H. Osborne and Charles Clagett, Frederick Colston, William Archer and Robert H. Archer, trading as Colston, Archer & Co., so believing did attempt to make certain assignment without receiving any fair consideration therefor, that is to say, the said Thomas H. Osborne, transferred two hundred shares of said stock to John W. Maury, of the district of Columbia; and said Charles Clagett, transferred one hundred shares of said stock to said John W. Maury; the said defendants trading as Colston, Archer & Co., as aforesaid, attempted to transfer of said stock to said Josiah Colston, including the said fifty shares belonging to Oscar King, as aforesaid. And your orator charges that the said defendants trading as Colston, Archer & Co., as aforesaid, and said Osborne & Clagett, each of them made then several respective alleged assignment aforesaid, with intent and purpose to evade their personal liability in the premises under the provisions of said act of Congress approved on the 3rd day of June, 1864, and that the said alleged assignees, who as your orator charges, are pecuniarily unable to pay to your orator the several amounts chargeable against them as ostensible shareholders in said association, were all and each of them cognizant of and privy to the said purpose and designs of said several assignors at the time of said respective assignments.
9 And your orator is advised and charges that said patented assignments, and each of them, ought to be treated as null and void, and the said assignors and said Oscar King, who are believed to be solvent, held personally responsible in a sum of money equal to the par value of the stock so by them respectively attempted to be assigned and so belonging to said King; but in case the said alleged assignors shall not be held responsible in the premises, then your orator will insist on the liability of said alleged assignees. And your orator is informed and believes and so charges that the shares of stock appearing in the name of the said Charles Goodwin, in fact belonged to and were held by him for the use and on account of the president and directors of the said Franklin Bank, of which said bank your orator charges that he the said Goodwin was and is cashier, and as such only held the said stock for the last said bank. Your orator therefore charges that the said Franklin Bank is responsible to him for the par value of the stock appearing in the name of the said Goodwin, but if on the hearing hereof it should appear that the said Goodwin owned said shares as his individual property and not as the agent or cashier of said bank, then your orator prays a decree against him as against other stockholders. Your orator further sheweth that of the other stockholders of said Merchants' National Bank of Washington, to wit: D. Randolph Martin, is a citizen of the State of New York; and your orator charges that he is

10 the holder of the stock standing on said schedule in the name of L. Huyck and John H. D. Richards; Ward H. Lamon, Benjamin R. Mayfield, S. Thomas Browne, John W. Maury, W. J. C. Duhamel, E. D. Brown, Charles A. Sherman, Charles H. Snow, L. Hamilton, Leonard Huyck, H. E. Leech, Charles W. Boteler, A. J. Duvall, and Edward Hall, are citizens of the District of Columbia, and cannot be made parties by reason of their being out of the jurisdiction of the court and because their joinder as parties would oust the jurisdiction of this honorable court, wherefore your orator prays that this cause may proceed without making them parties hereto. And to the end that an account may be taken under the directions of this court in the premises, and that a decree may be passed directing the defendants or such of them as may be held liable as stockholders in said association to pay unto your orator then and each of their pro rata of such balance of indebtedness as may be found upon such accounting to remain after applying all the available of said association in manner and form as required by said acts of Congress; and that your orator may have such other and further relief as to your hon. court may seem just and proper.

May it please your honor to grant unto your orator the United States writ of subpœna against Patrick Gibson, a citizen of the State of Maryland; John S. Barry, a citizen of the State of Mary-
11 land; Lawrence P. Bayne, a citizen of the State of Maryland; Sue L. Hough, a citizen of the State of Maryland; Oscar King, a citizen of Maryland; The National Mechanics' Bank of Baltimore, a corporation established and doing business in the State of Maryland; John S. Carlile, a citizen of the State of Maryland; Josiah Colston, a citizen of the State of Maryland; and Frederick Colston, William Archer and Robert H. Archer, trading as Colston, Archer & Co., citizens of the State of Maryland; Thomas H. Osborne and Charles Clagett, the last two being citizens of Maryland; Charles Goodwin, a citizen of the State of Maryland; and the said president and directors of the Franklin Bank of Baltimore; commanding them and each of them to appear in this court in person or by solicitor by a certain day therein named to abide by and perform such decree as may be passed therein. And as in duty, &c.

R. J. BRENT,
Sol'r for Compl'nts.

The exhibits referred to in the aforegoing bill of complaint are as follows, to wit:

Exhibit A.—Copy of protest.

WASHINGTON, D. C., *May 7th*, 1866.

SIR: You are hereby notified that a note, A. No. 69,886,
12 issued by the Merchants' National Bank of Washington, signed by William Bayne, pres't, and L. Huyck, cashier, for five dollars, was this day presented by me for payment to the cashier of said bank, at its banking-house in Washington city; payment of

the same was duly demanded and refused by the cashier, stating that said bank had suspended payment and that he declined to redeem said note, and it was therefore protested for non payment.

(Signed) WM. E. HOWARD,
Notary Public.

To Hon. F. CLARKE, *Comptroller of the Currency.*

Exhibit B.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
Washington, D. C., May 8, 1866.

Notice having been received by me, that the Merchants' National Bank of Washington, D. C , a national banking association, formed pursuant to the laws of the United States, and located at Washington, D. C., has failed to redeem its circulating notes when payment thereof was legally demanded at the office of said association, and being satisfied from the protest of one of the circulating notes of said bank that the said association has failed to redeem in law-
13 ful money of the United States its circulating notes when payment thereof was legally demanded during the usual hours of business, at the office of said association, and has failed to redeem or pay its obligations: Now therefore, I, Freeman Clarke, Comptroller of the Currency, in pursuance of the power and authority vested in me by law, do hereby appoint James C. Kennedy, of Washington, in the District of Columbia, a receiver for the Merchants' National Bank of Washington, with all the power, duties and responsibilities given to or imposed upon a receiver under the provisions of the act entitled "An act to provide a national currency secured by a pledge of United States bonds to provide for the circulation and redemption thereof," approved June 3rd, 1864.

In witness whereof, I have hereto subscribed my name and have caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, the day and year above written.

[SEAL.] (Signed) FREEMAN CLARKE,
Comptroller of Currency.

Copy of Exhibit C.

Know all men by these presents, that we, James G. Berrett and James C. Kennedy, are held and firmly bound unto Freeman
14 Clarke, Comptroller of the Currency, in the sum of fifteen thousand dollars, to be paid to the said Freeman Clarke, Comptroller of the Currency, his successors in office or assigns, for which payment well and truly to be made, we do hereby bind ourselves jointly and severally and our several heirs, executors and administrators firmly by these presents. Sealed with our seals and dated the 10th day of May, one thousand eight hundred and sixty-six.

Whereas the said James C. Kennedy has been appointed receiver for the Merchants' National Bank of Washington, located at Wash-

ington, District of Columbia, under the provisions of the act of Congress entitled, An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof, approved June 3d, 1864:

Now therefor, the conditions of this obligation are such that if the said James C. Kennedy shall well and truly observe and perform the duties imposed upon him by law, as such receiver, then this obligation to be void, otherwise of full force and effect.

(Signed) JAMES C. KENNEDY.
JAMES G. BERRETT.

Signed and sealed in the presence of—
N. CALLAN.

15 DISTRICT OF COLUMBIA, *Washington County, ss:*

On this 11th day of May, personally appeared before me James G. Berret and James C. Kennedy, to me well known, and acknowledged to me that they had executed the within bond for the purpose therein mentioned.

[SEAL.] N. CALLAN, *Notary Public.*

[5-ct. stamp,]
N. C.,
11 May, 1866.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

James G. Berret and James C. Kennedy being duly sworn, depose and say each for himself that he is worth the sum of fifteen thousand dollars over and above all debts and liabilities which he owes or has incurred, and exclusive of his property, except from levy and sale upon execution by law.

(Signed) JAMES C. KENNEDY.
JAMES G. BERRET.

Subscribed and sworn to before me this 11 day of May, 1866.

[SEAL.] (Signed) N. CALLAN, *Notary Public.*

[5-ct. stamp.]
N. C.,
11 May, 1866.

TREASURY DEPARTMENT, *Office of the Comptroller of Currency, ss:*

I hereby certify the foregoing to be a true copy of the original bond of James C. Kennedy as receiver for the Merchants' National Bank of Washington, D. C., with the acknowledgments and
16 affidavits of justification thereof now on file in this office, and of the whole of such original, and that such originals were so filed on the day of May, A. D. 1866.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents at the city of Washington, in the District of Columbia, this eighth day of June, A. D. 1866.

[SEAL.] (Signed) F. CLARKE, *Comptroller.*

Exhibit D.

Stockholders' names.	No. shares.		
J. H. D. Richards	10	1,000	Original.
W. H. Lamon	10	1,000	Original.
P. Gibson	100	10,000	Subscribed by T. H. Osborne originally.
J. S. Barry	100	10,000	Subscribed originally by J. B. Stewart.
R. R. Mayfield	53	5,300	Original.
S. T. Brown	22	2,200	Original.
J. W. Maury	213	21,300	Original.
L. P. Bayne	100	10,000	Transferred by W. Bayne Feb. 1st, 1865. Originally subscribed by T. R. Stewart.
W. J. C. Duhamell	12	1,200	Transferred by J. W. Maury, Feb. 1st, 1865.
E. D. Browne	2	200	Transferred by J. W. Maury, Feb. 1st, 1865.
Sue L. Hough, Baltimore.	50	5,000	Transferred by J. W. Maury, being part of original subscription.
C. A. Sherman	200	20,000	Transferred by Zeph. English, issued to English April 4, 1865, being a portion of the am't assured by Wm. Bayne and originally subscribed for by J. B. Stewart.
17			
C. H. Snow	50	5,000	Transferred by J. R. Elvans, Jan. 31st, 1866.
Ann L. Hamilton	6	600	2 shares transferred by J. W. Maury, 4 shares by S. J. Kennedy, Oct. 26, 1865, the latter 4 shares having been transferred to S. J. Kennedy by J. W. Maury, Feb. 1st, 1865.
L. Huyck	422	42,200	122 shares transferred by J. W. Maury, 100 shares C. H. Clagett, 200 shares by T. H. Osborne, the 100 shares from Clagett by Maury, Sept. 2d, 1865.
National Mechanics' Bank of Baltimore	200	20,000	Transferred by Wm. Bayne. Originally subscribed by J. B. Stewart.
Over	1550	155,000	
Brought over	1550	155,000	
18 John S. Carlile	100	10,000	Transferred by L. Huyck, Dec'r 18, 1865, which stock was transferred by Wm. Bayne, being a part of the amount assumed by him and originally subscribed by T. H. Osborne.
Charles Goodwin	100	10,000	Transferred by T. H. Osborne, Ap'l 26.
H. E. Leech	90	9,000	Transferred by C. W. Boteler, May 2d.
C. W. Boteler	10	1,000	Balance of the original $10,000.
J. Colston	100	10,000	50 shares transferred by O. King to Colston, Archer & Co. Colston, Archer & Co. transferred the same and 50 shares from L. P. Bayne to J. Colston, on the 2nd day of May.
A. J. Duvall	50	5,000	Transferred by Edward Hall, May 3rd, 1866.

Whereupon subpœna issued as prayed in form following, to wit:

Subpœna.

THE UNITED STATES OF AMERICA, *District of Maryland, to wit*:

To Patrick Gibson, John S. Barry, Lawrence P. Bayne, Sue L. Hough, Oscar King, the National Mechanics' Bank of Baltimore, John Carlile, Josiah Colston and Frederick Colston, William Archer and Robert H. Archer, trading as Colston, Archer & Co., Thomas H. Osborne and Charles Clagett, Charles Goodwin, the president and directors of the Franklin Bank of Baltimore, all of the State of Maryland, greeting:

You are hereby commanded that, all excuses and delays
19 set aside, you be and appear before the judges of the Circuit Court of the United States for the fourth circuit in and for the Maryland district, at the clerk's office, at the United States court-house in the city of Baltimore, on the first Monday in July next, to answer unto the bill of complaint of James C. Kennedy, a citizen of the State and city of New York, as receiver of the Merchants' National Bank of Washington, in the said court exhibited against you.

Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable S. P. Chase, Chief Justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and sixty-five.

Issued June 29, '66.

[SEAL.] JAS. W. CHEW,
Clerk Circuit Court.

At which said first Monday of July, in the year last aforesaid, being the return day of the aforegoing subpœna, the marshal of the Maryland district, to whom the same was delivered to be served, made return thereof to the court here, thus endorsed, to wit:

Marshal's return.

Summoned P. Gibson, the National Mechanics' Bank of Baltimore, Josiah Colston, Fred'k Colston, Wm. Archer, Robt. H. Archer, Chas. Goodwin, and the president and directors of the Franklin Bank of Baltimore. Non est the others.

W. BONIFANT, *U. S. M.*

Whereupon the said Josiah Colston, Frederick Colston, William Archer, and Robert H. Archer appear in court here by Charles Marshal, esquire; and Charles Goodwin and the Franklin Bank of Baltimore appear in court here by William George Brown and Frederick W. Browne, esquires; and Patrick Gibson appears in court here by William Schley, esquire; and Lawrence P. Bayne and Oscar King appear in court here by Thomas S. Alexander and R. Stockett Mathews, esquires; and the National Mechanics' Bank of Baltimore appears in court here by Reverdy Johnson, esquire.

And afterwards, to wit, on the 13 day of August, in the year last aforesaid, subpœna was renewed in form following, to wit:

THE UNITED STATES OF AMERICA, *District of Maryland, to wit:*

To John S. Barry, Sue L. Hough, John S. Carlile, Thomas H. Osborne, and Charles Clagett, citizens of the State of Maryland, greeting:

You are hereby commanded that, all excuses and delays 21 set aside, you be and appear before the judges of the Circuit Court of the United States for the fourth circuit in and for the Maryland district, at the clerk's office, at the United States court-house in the city of Baltimore, on the first Monday in September next, to answer unto the bill of complaint of James C. Kennedy, a citizen of the city and State of New York, as receiver of the Merchants' National Mechanics' Bank of Washington, in the said court exhibited against you.

Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of our Su-

preme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and sixty-five.

Issued the 13 day of August, 1866.

[SEAL.] JAMES W. CHEW, *Clerk Circuit Court.*

At which said first Monday of September, in the year last aforesaid, being the return day of the aforegoing subpœna, the marshal of the Maryland district, to whom the same was delivered to be served, made return thereof to the court here, thus endorsed, to wit:

Marshal's return.

Summoned Barry. Non est the others.

W. BONIFANT, *U. S. Marshal.*

22 Whereupon the said John S. Barry appears in court here by J. N. Steele and Samuel H. Jagart, esquires.

And afterwards, to wit, on the 13 day of September, in the year last aforesaid, subpœna was renewed in form following, to wit:

THE UNITED STATES OF AMERICA, *District of Maryland, to wit:*

To Sue L. Hough, John S. Carlile, Thomas H. Osborne, and Charles Clagett, citizens of the State of Maryland, greeting:

You are hereby commanded that, all excuses and delays set aside, you be and appear before the judges of the Circuit Court of the United States for the fourth circuit in and for the Maryland district, at the clerk's office, at the United States court-house in the city of Baltimore, on the first Monday in October next, to answer unto the bill of complaint of James C. Kennedy, a citizen of the city and State of New York, as receiver of the Merchants' National Bank of Washington, in the said court exhibited against you.

Hereof you are not to fail at your peril and have

Witness the Honorable S. P. Chase, Chief Justice of our Supreme Court, the first Monday in December, in the year of our Lord

23 one thousand eight hundred and sixty-five.

Issued 13 day of Sept., 1866.

[SEAL.] JAS. W. CHEW, *Cl'k Crct. Ct.*

And afterwards, to wit, on the 25th day of September, in the year last aforesaid, the following demurrer was filed in court here, to wit:

Demurrer.

The joint and separate demurrer of John S. Barry, a citizen of the State of Maryland; of Charles Goodwin, likewise a citizen of said State, and of the president and directors of the Franklin Bank of Baltimore, a corporation incorporated under the laws of the State of Maryland, and doing business therein, and of the National Mechanics' Bank of Baltimore, to the bill of complaint of James C. Kennedy, receiver, against these defendants and others, exhibited in the Circuit court of the United States in and for the Maryland district.

These defendants, by protestation, not confessing or acknowledg-

ing all or any of the matters in the said bill of complaint contained to be true in manner or form as the same are therein set forth, do, and each of them doth, demur thereto, and for causes of demurrer doth show:

24 1st. That the said complainant has not in and by his said bill stated such a case as does or ought to entitle him to any such discovery or relief as is thereby sought and prayed for, from and against these defendants, or any of them.

2d. That the complainant, as appears on the face of his bill, sues as receiver of a banking association, organized under the act of Congress, and located at Washington city, in the District of Columbia, and for the recovery of pretended claims belonging to, or for the benefit of, creditors of said association, whose names and residences are not stated, and that therefore this court has not jurisdiction over the said cause, and the same ought not to be by it inquired of.

3d. That D. Randolph, Martin, L. Huyck, John D. Richards, and others named in the said bill as stockholders of said banking association, not residing in the State of Maryland, are, by complainant's own showing, proper and necessary parties to any suit brought, or to be brought, against these defendants touching any of the pretended matters of equity charged in said bill.

4th. That the alleged creditors of said banking association, as appears upon the face of said bill, are necessary and proper parties to any suit brought against these defendants touching any of the pretended matters of equity charged in said bill.

25 Wherefore, and for divers other errors and imperfections, these defendants demand the judgment of the court, whether they shall be compelled to make any other or further answer to said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs on this behalf sustained.

The undersigned solicitors for the above named-parties certify, that in their opinion the foregoing demurrer is well founded in point of law.

J. NEVETT STEELE,
Solicitor of John S. Barry.
BROWNE & BRUNE,
Solicitors for Chas. Goodwin & President & Directors of Franklin Bank.
REVERDY JOHNSON,
Sol. for N. M. B. of Balt.

On the 25th day of September, A. D. 1867, before me, Isaac Brooks, jr., U. S. commissioner, appear John S. Barry and Charles Goodwin in his own right and as cashier of the Franklin Bank, within named, and severally made oath that the demurrer of the parties within named to the bill of complaint of James C. Kennedy, therein mentioned, is not interposed for delay.

ISAAC BROOKS, JR.,
U. S. Commissioner.

[2 5-cent U. S. rev. stamps.]

At which said first Monday of October, in the year last aforesaid, being the return day of the last aforegoing subpœna, the marshal of the Maryland district, to whom the same was delivered to be served, made return thereof to the court here, thus endorsed, to wit:

Marshal's return.

"All summoned.

"W. BONIFANT, *U. S. Marshal.*"

Whereupon the said Charles Clagett appears in court here, by Daniel Clarke, esquire, and the said John S. Carlisle appears in court here, by Peter W. Craine, esquire, and the said Sue. L. Hough appears in court here, by William A. Fisher, esquire, and the said Thomas H. Osborne appears in court here, by Thomas G. Pratt, esquire.

Whereupon the court passed the following decree, to wit:

In the Circuit Court of the United States for the 4th circuit, Maryland district.

JAMES C. KENNEDY, receiver, &c.,
vs.
PATRICK GIBSON & OTHERS, stockholders of the Merchants' National Bank of Washington. } In equity.

Decree.

This cause coming on to be heard on demurrer, and being
27 submitted, the proceedings were read, and heard, and considered.

It is thereupon, this 17th day of June, A. D. 1867, by the Circuit Court, and by the authority thereof, ordered, adjudged, and decreed that the demurrer in this case be, and the same is ruled good.

And it is further adjudged, ordered, and decreed that the bill of complaint of complainant be, and the same is hereby dismissed, and that the complainant pay the defendants their costs of this suit, to be taxed by the clerk.

WILLIAM F. GILES.

And afterwards, to wit, on the 3d day of July, in the year of our Lord 1867, the following paper was filed in court here, to wit.

In the Circuit Court of the United States, Maryland district, April term, 1867.

KENNEDY, receiver, &c.,
vs.
GIBSON & OTHERS.

All the defendants who have answered crave leave to withdraw their answers, and to join in the demurrer filed in the cause. By consent of sol'r for complainant, leave granted as prayed, and

answers withdrawn, and all defendants treated as having joined in the demurrer.

28 After leave granted as above, demurrer sustained, and upon motion of defendants, bill dismissed. Complainant prayed an appeal in open court.

WILLIAM F. GILES.

June 17th, 1867.

It is agreed that in making up the record for the Supreme Court, all the answers filed may be omitted, and all the defendants treated as having joined in the demurrer at the date of the filing thereof.

R. J. BRENT, *for Compl't.*
C. MARSHALL, *for Def'ts.*

June 17th, 1867.

From which said decree so as aforesaid, the said James C. Kennedy, the complainant, by his attorney aforesaid, has prayed an appeal to the Supreme Court of the United States, to be held at the city of Washington on the first Monday in December next.

Thereupon, it is ordered by the court here, that the record and proceedings aforesaid, with all things relating thereto, be transmitted to the said Supreme Court, and the same is hereby transmitted accordingly.

Appeal bond.

[50-cents U. S. int. rev. stamp.]

29 Know all men by these presents that we, James C. Kennedy of the State of New York, and E. P. Arstrop of Washington, D. C., are held and firmly bound unto Patrick Gibson, John S. Barry, Lawrence P. Bayne, Sue L. Hough, Oscar King, Nat. Mechanics' Bank of Baltimore, John S. Carlile, Josiah Colston, Wm. Archer, Robt. H. Archer, Thomas H. Osborne, Charles Clagett, Chas. Goodwin, the pres't and directors of the Franklin Bank of Balt., their executors, administrators, and assigns in the full and just sum of five hundred dollars current money; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Dated this 12th day of August, in the year 1867.

Whereas the above-bounden James C. Kennedy has appealed to the Supreme Court of the United States from a decree of the Circuit Court of the United States for the district of Maryland, bearing date the day of June, 1867, in a cause, in which the said James C. Kennedy was complainant, and the said Patrick Gibson, John S. Barry, Lawrence P. Bayne, Sue L. Hough, Oscar King, Nat. Mechanics' Bank of Balto., John S. Carlile, Josiah Colston, Frederick Colston, Wm. Archer, Robt. H. Archer, Tho's H. Osborn, Charles Clagett, Charles Goodwin, the pres't and directors of the

30 Franklin Bank of Baltimore were defendants:

Now, therefore, the condition of this obligation is such that if the above-named complainant, James C. Kennedy, shall prosecute

his appeal with effect, and pay all such costs and expenses as shall be awarded against him as such appellant therein, then this obligation to be void, otherwise to remain in full force and effect.

[SEAL.] JAMES C. KENNEDY.
[SEAL.] E. P. ARSTROP.

Sealed and delivered in presence of—
JOHN W. MAURY.

From my personal knowledge of the above parties I consider this bond ample security, Mr. Kennedy being himself a man of large fortune.

R. I. BRENT.

Bond approved August 16, 1867.

WILLIAM F. GILES.

31 In testimony that the foregoing is a true copy taken from the record and proceedings aforesaid, I hereunto subscribe my name, and affix the seal of the said Circuit Court this fifth day of September, in the year of our Lord one thousand eight hundred and sixty-seven.

JAMES W. CHEW,
Clerk Circuit Court.

[5-ct. int. rev. stamp.]

In the Circuit Court.

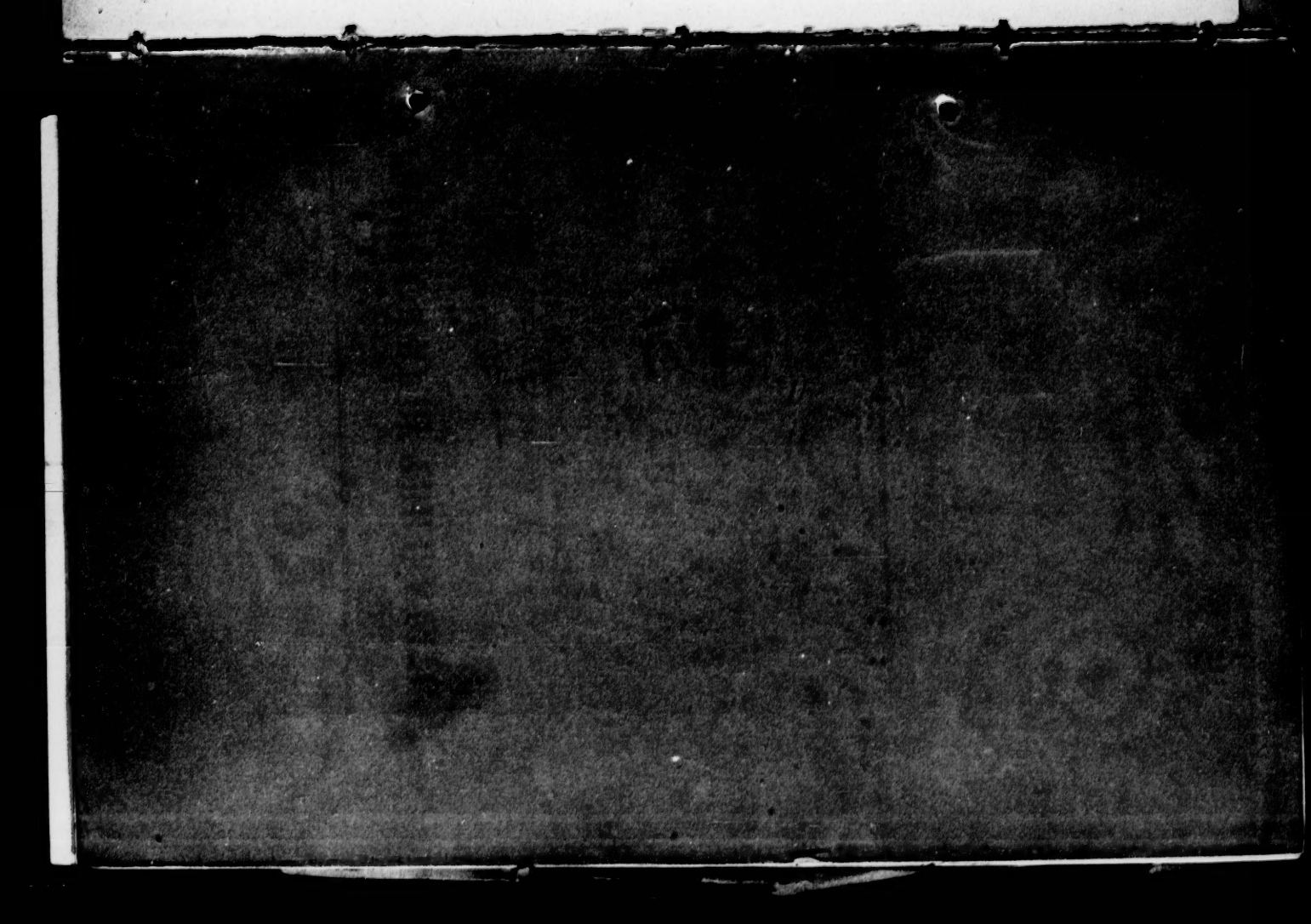
JAMES C. KENNEDY, receiver, &c.,
vs.
PATRICK GIBSON AND OTHERS. } In equity.

THE UNITED STATES OF AMERICA, *District of Maryland, to wit*:

Complainant's costs	$74 84
Record to Supreme Court	13 75
	$88 59

Test:

JAMES W. CHEW,
Clerk Circuit Court.



SUPREME COURT OF THE U. STATES

KENNEDY, RECEIVER OF THE MERCHANTS' NATIONAL BANK OF WASHINGTON,

vs.

GIBSON ET AL.

BRIEF OF

ROBERT J. BRENT,
AND
RICHARD T. MERRICK. } *For the Appellant.*

SUPREME COURT OF THE U. S.

KENNEDY, Receiver of The Merchants' National Bank of Washington,
vs.
GIBSON *et al.*

Appellant's Brief.

This is an appeal from the decree of the circuit judge of the United States for the District of Maryland, dismissing the bill of the Appellant on demurrer. See p. 12.

The bill was filed by the Appellant as Receiver, to enforce the personal liability of the stockholders under the 12th section of the currency act of June 3d, 1864, (13 Stat., p. 102.)

The grounds on which he claims relief and the nature of that relief, will appear in the following extracts from the bill:

Your orator further sheweth that two thousand shares of the capital stock in said association were duly issued by it, and he verily believes, from a careful examination into the condition of said association, and so believing charges, that it will be necessary for the payment of the just debts and liabilities of the said association to obtain from said stockholders an amount of money equal to the full amount of all the stock so issued, according to its par value, and which your orator charges to be of the value and to the amount of two hundred thousand dollars; and your orator is advised, and charges, that he is entitled to have an account taken, as against said stockholders, of the amount of indebtedness due, or to be due, by said association, and the

amount of its available assets and credits, and to recover from each of said stockholders individually, in proportion to the number of shares held by him, her, or it in said capital stock, equally and ratably, a contribution to the extent of the amount of stock held by him, her or it, at the par value thereof, in addition to the amount by him, her, or it, invested in said shares, for the purpose of making good and paying any deficiency or balance of the indebtedness of said association which may remain after the application of all the available assets and credits of said association to the discharge of said indebtedness.

And your orator avers and charges that after such application is made, a balance of indebtedness, to its creditors will remain due and owing from said association largely exceeding the said sum of two hundred thousand dollars, the par value, as aforesaid, of all its stock in the hands of said stockholders.

* * * * * * * * * * *

And to the end that an account may be taken under the directions of this Court in the premises, and that a decree may be passed directing the defendants or such of them as may be held liable as stockholders in said association to pay unto your orator their and each of their pro rata of such balance of indebtedness as may be found upon such accounting to remain after applying all the available funds of said association in manner and form as required by said acts of Congress; and that your orator may have such other and further relief as to your Hon. Court may seem just and proper.

As the demurrer confesses the facts stated in this bill, the ouly question is, whether on the case made, the Court had jurisdiction to decree an account and grant relief.

The bill shows, that by the protest of a note, the Comptroller had authority to act as directed in the 46th, 47th, 48th, and 49th sections. 13 Stat., p. 113, 114.

And it shows, that under the provisions of the 50th section, the Appellant was duly appointed Receiver. 13 Stat. 114–115.

1st. It will be maintained by us, that the Receiver in this case had authority to bring this suit in his own name for the protection of the interests of all parties.

It will not be disputed by us, that if a Receiver is ap-

pointed by a Court, he must, ordinarily, obtain an order of the Court authorizing him to sue.

Edwards on Receivers, 135
Smith on Receivers, 165.
Merritt vs. Lyon, 16 Wend., 410.

But here the Receiver is a statutory officer, nominated by the Comptroller, and when qualified to act, is clothed with ample powers under the law.

By the 50th section he is required, under the direction of the Comptroller, to "take possession of the books, records, and *assets of every description, collect all debts, dues, and claims*, &c., and upon the order of the Court may sell and compound all bad debts, and on a like order, may sell all the real and personal property, &c., on *such terms* as the Court shall direct."

So far he must act by the order of the Court.

But then it is further declared, that *the Receiver* "may, *if necessary to pay* the debts of the association *enforce the individual* liability of the stockholders provided for by the 12th section, and such Receiver shall pay over all money so made, to the Treasurer of the United States, subject to the order of the Comptroller, &c., and *also make* report of all his acts and proceedings to the Comptroller." 13 Stat. 114–115.

We submit, that under this section, the Receiver may, in his own name and without the order of the Court or Comptroller, enforce the 12th section against stockholders, and it is his duty to do so. So far as the supervision of the Comptroller may be involved, the presumption is, that the Receiver is acting always under his authority, unless the contrary appears.

How can the Receiver, if it *be necessary* to pay the debts, "*enforce* the individual liability of *the stockholders*, unless he is competent to bring a suit in his own name for that purpose, in which he may show the condition of the association and the necessity and extent of the liability?

Story vs. Furman, 25 New York R., 219.

This was a National Bank, and its directors could no longer act or bring suits, after all its books, assets, and affairs were taken from them.

Bank of Poughkeepsie vs. Ibbotson, 24 Wendell, 479 and Story vs. Furman, 25 N. Y. R., 225.

It results, either that *the Receiver* is to sue whenever suit

may be necessary, or that as many Receivers should be appointed as there were States in which suits must be brought. If the Court had the appointment of the Receiver he could not sue extra-territorially as decided in Booth vs. Clark, 17 How., 322.

It was to meet this difficulty, that a Receiver of the National Banks is to be appointed by the Comptroller and not by the local Courts.

Hence it results, that this National Receiver can sue to enforce the express power conferred on him, or there is no other person competent to sue. Very little aid can be derived from examining the State decisions, as in most, if not all the States, the statutory Receiver, is expressly authorized to sue.

2*d*. We shall maintain that contribution, pro rata, among the stockholders for the purpose of making good the deficiency of assets to pay the debts, is a matter peculiarly of equitable jurisdiction.

Briggs vs. Penniman, 8 Cowen, 395 and 396.
1 Cas. Ch., 204.

Nor is it any objection to this contribution, that some of the stockholders are non-residents.

All the authorities recognize this as a general rule:

2 Story, Eq., Juris, sec. 15, 26.
2 Mad. Ch. Pr. 222, 238.
Daniell's Ch. Pl. & Pr. 329.
Wiser vs. Blakeley, 1 Johns. Ch., 437.
Hadley vs. Russell, 40 N. H.

But to this general rule there are some exceptions. Where persons interested are out of the jurisdiction of the Court, and it is so stated in the bill and admitted by the Defendant's answer or proved, it is not necessary to make them parties.

2 Mad. Ch. Pr. 219, 222.

In Elmendorf vs. Taylor, 10 Wheat, 167, it is said by the Supreme Court of the United States, "that the rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the Courts of the United States, is not applicable to all. In the exercise of its discretion, the Court will require the plaintiff to do all in his power to bring every person concerned in interest before the Court.

But if the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the Court cannot reach, as if such party be the resident of some other State, ought not to prevent a decree upon its merits. It would be misapplication of the rule to dismiss the Plaintiff's bill, because he has not done that which the law will not enable him to do."

And in Mallow vs. Hinde, 12 Wheat., 198, the same Court, in speaking of this principle says, "in that cast, (Elmandort vs. Taylor,) the right of the party before the Court did not depend upon the right of the party not before the Court, each of their rights stood upon its own independent basis, and the ground upon which it was necessary according to the general principle, to have both before the Court, was to avoid multiplicity of suits and to have the whole matter settled at once." In this case, (Mallow vs. Hinde,) the complainants have no rights separable from and independent of the rights of persons not made parties. The rights of those not before the Court lies at the very foundation of the claim of right by the Plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties." For this reason, the latter bill was dismissed, but the former was sustained, even though certain parties living out of the State, and who could not for that reason, be made parties, were interested, and though there might be occasion for further litigation, in order to adjust the whole subject matter between all parties interested.

2 Story, Eq. Juris, sec. 15, 26.
Chalmers vs. Hack, 18 Maine, 124.

The service of a subpœna to appear and answer made out of jurisdiction is a nullity, and proceedings founded thereon, will be set aside.

Creede vs. Byrne, 1 Hogan, (Irish R.) 79.
Dunn vs. Dunn, 4 Paige, 425.

So it is stated in Lord Redesdale's treatise on pleading, that "where a person who ought to be a party is out of the jurisdiction of the Court, that fact being stated in the bill and admitted by the Defendants or proved on the hearing, is, in most cases, a sufficient reason for not bringing him before the Court."

Daniell's Ch. Pl. and Pr. 238.

Such a construction would be harsh towards the stockholders, if, as the argument supposes, they are to be bound by the ex-parte judicial action of an executive officer ascertaining the amount of debts. And if not bound by a proceeding where they were no parties, and could not be heard, then such preliminary ascertainment would be idle and nugatory when the bill should be afterwards filed to enforce the stockholders liability.

But this is all fallacious, as the Comptroller's authority is only to arise after the Receiver, "*collects*, *pays* over *and reports.*"

In ordinary cases, the Receiver collects the assets without enforcing the stockholders clause. In such cases as the Comptroller is to distribute, he must satisfy himself who are creditors, or have the judicial evidence. But Congress never meant to refer the judicial enquiry of "how far the stockholders should contribute" to an executive officer. The Court must decide that vital question upon notice, and by taking an account when that is done, and the Receiver pays over what he collects from debtors and stockholders, the Comptroller will find his judicial proof of the creditors in that record, and in such case there can be no surplus to distribute to the stockholders, as there might be where the Bank is not insolvent.

Upon this question the court may be enlightened as to the mode of proceeding, by consulting some cases under the New York Statute.

See Story vs. Furman 25 N. Y. Rep., 222.
In the matter of the Hollister Bank, 23 N. Y. Rep., 508.

Whenever the deficit will absorb the full liability of each stockholder, the only assessment is to the full amount of his stock.

Story vs. Furman, 25 N. Y. Rep., 231.

4th. The Receiver represents in such a proceeding all the rights of the U. States and creditors, none of whom need be made parties as this Court is only to adjudicate on the question of the deficiency of assets and the amount payable to the Receiver by each stockholder.

See Gillet vs. Moody, 3 Comstock, 479.
16 N. Y. R., 377, Rankins vs. Elliot.
Rosevelt vs. Brown, 1 Kernan Rep., 152.

5th. It will be said that this suit should have been

brought by the District Attorney, under the 50th section of the Currency Act.

This question was fully considered by the Secretary of the Treasury as will be seen by his letter made a part hereof.

TREASURY DEPARTMENT,

Aug. 28*th*, 1866.

SIR: Your letter of this date enclosing the reply of J. C. Kennedy, Esq., Receiver of the Merchants' National Bank of Washington, to the opinion of the Solicitor of the Treasury, has been received and transmitted to the Solicitor for his examination.

The employment of Messrs Brent and Merrick as special counsel for the Receiver is, under the circumstances of this particular case, approved by the Department.

Very respectfully, yours,

HUGH McCULLOCH,

Secretary of the Treasury.

H. R. HULBURD, ESQ.,

Deputy and Acting Comptroller of Currency,

Treasury Department.

The section referred to is directory only, and addressed to the Executive Department of the Government, or the Receiver, and can in no way, affect the jurisdiction of the Court.

R. J. BRENT,
R. T. MERRICK,

For Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 210.

JAMES C. KENNEDY, RECEIVER, ETC.,

vs.

PATRICK GIBSON, JOHN S. BARRY, LAWRENCE P. BAYNE, THE NATIONAL MECHANICS' BANK OF BALTIMORE, CHARLES GOODWIN, THE PRESIDENT AND DIRECTORS OF THE FRANKLIN BANK BALTIMORE, AND OTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Appellees' Statement and Points.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 210.

JAMES C. KENNEDY, RECEIVER, ETC.,

vs.

PATRICK GIBSON, JOHN S. BARRY, LAWRENCE P. BAYNE, THE NATIONAL MECHANICS' BANK OF BALTIMORE, CHARLES GOODWIN, THE PRESIDENT AND DIRECTORS OF THE FRANKLIN BANK BALTIMORE, AND OTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Appellees' Statement and Points.

On the 29th June, 1866, Jas. C. Kennedy, alleging himself to be a citizen of the State of New York, filed a bill in the Circuit Court of the U. States for the District of Maryland, against various defendants named in the bill and all citizens of the State of Maryland, in which bill it is set forth:—That said Kennedy was receiver of the Merchants' National Bank of Washington, duly appointed and qualified under section 15 of the Act of Congress of June 3d, 1864, "to provide a national currency," &c.; that said Merchants' National Bank went into operation under the Act of Congress of Feb'y 25th, 1863, and after contracting large liabilities in the course of its transac-

tion of the business of a National Bank, it did, on the 8th of May, 1866, fail to redeem its circulating notes, and was protested, and the Comptroller of the Currency thereupon appointed the said Receiver, who then took possession of the books, papers and assets of said Bank, and was at the time of filing the bill engaged in collecting the debts due the Bank, and in discharging the other duties devolved on him by law. The bill then states *that the Receiver had already ascertained that the assets and credits of the said Bank were wholly insufficient to pay its debts and liabilities, and that it would be necessary to the complete and entire administration of his trust, that recourse should be had to the personal liability imposed on the stockholders by the said Acts of Feb'y 5th*, 1863, *and July 3d*, 1864.

The bill further states that 2,000 shares of stock were duly issued by said Bank, and the complainant avers his belief, and on that belief charges, *that it will be necessary for the payment of the liabilities of this Bank to obtain from its stockholders an amount of money equal to the full amount of the stock so issued, according to its par value, that is*, $200,000. *He therefore insists that he is entitled to have an account taken, as against said stockholders, of the liabilities and available assets and credits of said Bank, and to recover from each of said stockholders individually a proportionate contribution, for the purpose of making good any deficiency which may remain after applying all said assets and credits to the discharge of its liabilities; which deficiency, he charges, will largely exceed the said sum of* $200,000, *the par value of the whole capital stock.*

The bill then charges that at the failure of the Bank most of the defendants were shareholders of its capital stock to the amount stated in the schedule Exhibit D., annexed to the bill, and printed on p. 8 of the Record; and that the other defendants had been shareholders, but when they had reason to believe the Bank in insolvent circumstances, they made certain assignments of their shares, with intent to evade their personal liability under the Act of 1864, to persons not pecuniarily responsible; and the bill seeks to hold said assignors liable for contribution.

The bill further states, *that the other stockholders of the Merchants' National Bank of Washington, named in said Ex-*

hibit D, were citizens, some of New York and some of the District of Columbia, and could not be made parties, because being out of the jurisdiction of the Court, their being joined as defendants would oust the jurisdiction of the Court, and prays that the cause may proceed without making them parties.

Then follows the prayer for an account, and for a decree directing each of the defendants to pay their pro rata of such balance of indebtedness of the Bank as may remain after the application of its assets, and for further relief.

To this bill the defendants filed a demurer (p. 11 record) on the following grounds:

1. That the case stated in the bill did not entitle the complainant to the discovery or relief sought against the defendants, or any of them.

2. That the names and residences of the creditors of the Bank, for whose benefit the suit is brought, are not stated, and therefore the Court has not jurisdiction of the cause.

3. That the stockholders named in the bill, and therein averred to be non-residents of the State of Maryland, are necessary parties to any suit brought against the defendants touching any of the matters of equity charged in the bill.

4. That the alleged creditors of said Bank, as appears upon the face of the bill, are necessary and proper parties to any suit brought against the defendants touching any of the matters of equity charged in the bill.

The demurrer was sustained by the Court below, and a decree was passed dismissing the bill.

From that decree the complainant has taken the present appeal.

The appellees will contend that the bill was rightly dismissed, for the following reasons:

I. The suit should have been brought by the District Attorney of the United States.

Section 56 of the Act of June 3d, 1864, provides "that all suits and proceedings arising out of the provisions of that act, *in which the United States, or its officers or agents shall be parties*, shall be conducted by the District Attorneys of the several districts, under the supervision of the Solicitor of the Treasury."

That the receiver is an officer or agent of the United States is clear, from the mode and purpose of his appointment, and the duties prescribed for him by the Act, [Section 50.]

And the payment of the circulation of the Bank, in case of its failure, being made at the treasury, and the United States having a paramount lien upon all its assets for re-imbursement, [sec. 47,] the United States are substantially parties in any such suit as the present.

The evident policy of this law is, that all proceedings under it shall be under the charge and direction of government officers; and the same policy explains the course of proceeding in ascertaining the liability of individual stockholders.

II. Assuming, for the sake of the argument, that no mode of administering the assets and distributing the proceeds had been provided by the law, a suit in equity would be a proper mode.

Crease vs. Babcock, 10 Metc., 525.
Grew vs. Breed, " " 569.
Bogardus vs. Rosendale, 3 Seld., 147.
Adderly vs. Storier, 6 Hill, 624.

Then, 1st—The question arises, who are necessary parties The general principle is, that to such a suit in equity the *creditors* must be parties, and *the corporation and all its stockholders defendants.* In regard to parties *defendant*, this rule is changed by the Act of Congress of 28th Feb., 1839, ch. 36; but the rule as to *parties complainant* remains unchanged, and it is insisted that the *creditors* of the Bank are necessary parties complainant, The Receiver cannot so represent them as to dispense with their being parties, *because the Receiver cannot prove their claims;* and *the account prayed for cannot be taken without the creditors coming in, and without their being bound by the proceedings.*

If, as is contended on the other side, the creditors all became parties by notice, under which they must come in and prove their claims, the consequence would be, that such a suit in equity as this could be brought in every State of the Union

* The act of 1839 Feb. 28. does not enable a Circuit Court to proceed in Equity in the absence of a party whose interests must necessarily be affected by the decree.
Nath'l. Md. R R co v. Mich. Cent. R R co. 15 How. 233.
Tobin v. Walkinshaw 1 McA. 26.
Shields v. Barrow 17 How. 130.
Cairns v. Chaudler 19 How. 113.
Greene v. Sifton 2 Curt 171.

where there is a single stockholder living, and in every one of them all the creditors must prove their accounts, and every one of the Courts has jurisdiction to have an account stated which will bind the creditors. Thus there might be a dozen or twenty different or inconsistent accounts, and as many different measures of the liability of the stockholders.

But the creditors are not bound to appear and prove their claims in this or any other equity suit. They can get their dividends from the Comptroller of the Currency by proof of their claims, and need go into no Court whatever for their proportion of the assets. [Sec. 50.]

The creditors are not bound by these proceedings, and they may sue each stockholder, where he resides, on his individual liability, after it is ascertained by the administration of the assets in the hands of the Treasurer of the United States. [Section 12.]

Angell & Ames' Corp., Sections 625, 626.
Bank of Poughkeepsie vs. Ibbotson, 24 Wend., 473.
10 Metc., 269.

Nothing in the act gives the receiver exclusive power to sue, nor can the creditors oblige the receiver to sue. So that, unless the creditors are *really* parties, the defendants can be sued by creditors without regard to these proceedings, and are subject to different liabilities.

If it is said that the construction we place upon the Act is productive of inconvenience, we answer that greater inconvenience arises from the construction claimed by the other side. If, in the first case, some suits to enforce the liability of individual stockholders would have to be brought in State Courts, in the latter, suits in equity must be brought by the Receiver in *every* State where a stockholder resided, and the creditors would have to prove their claims in every such suit.

And, 2dly—It must be "*necessary*" to proceed against the stockholders on the personal liability clause, and that must appear on the *face* of the bill, not by *general averment*, but by the statement of the *legal facts* showing the necessity. What those facts are appears from the law:—*There must have been administration of the assets, and a deficiency so ascertained*, according

to the requirements of the 50th section of the Act. At the very least the *ex parte* proof required by the Act must have been made.

If it be said that this very proceeding is brought as the *quo modo* of establishing the necessity of resorting to the personal liability by proof in this cause, the answer is, that this is not sufficient, because the law itself has established the *quo modo* of ascertaining the value of the assets and of the amount of the debts.

Reciprocity Bank 22 N. Y., 9.
Crease vs. Babcock, 10 Metc., 525.
Grew vs. Breed, 10 " 569.
Holliston Bank, 23 N. Y., 510.
Constitution N. Y., Art. 8, Sec. 7, (1849.)

Nor, 3dly—Does the demurrer have the effect of admitting the general averments of the bill, which are mere inferences; but it only admits the facts themselves set forth, from which the inferences are drawn. And if the facts legally necessary in order to entitle the complainant to relief are not stated, the demurrer is good.

Story Eq. Pl., Sections 446, 452.

In this case, if it be necessary, before enforcing the individual liability, to administer the assets, or to have the claims of creditors legally proved before the Comptroller of the Currency, or by adjudication of a Court of Law against the corporation—as we maintain—the demurrer to the bill must be good.

III. Thus, even if such a proceeding in equity as this were proper under the law, it could only be by making the creditors parties, and by showing that the assets were administered and found insufficient.

At worst, it could only be *either* by making the creditors parties, *or* by showing that the assets had proved insufficient.

To say that making the creditors parties would in some cases oust the jurisdiction, is no answer, for the greater injustice would be by the omission of them, and the State Courts would still be open.

IV. But, in fact, *there is neither jurisdiction nor power in the Circuit Court to have an account stated under this law; nor can such a suit in equity, as the present, be brought to enforce the individual liability of the stockholders.*

The creditors cannot in any manner be brought in under the proceedings, and forced to an ascertainment of their claims in that Court; nor is it competent under the law to decide on the proportion to be paid by the stockholders, *because it can take no account of the assets and liabilities.*

Under the law, the Receiver collects the assets, sells the property, &c., and pays over to the *Treasurer of United States*, and the *Comptroller of the Currency* receives the proof of the claims, decides on the dividends, and pays them to the claimant. [Sections 47, 48, 49, 50.] Thus, it is not the duty of the Receiver to ascertain the claims, nor has he the means of ascertaining them; and neither the claimants nor the Comptroller are before the Court.

There are two methods laid down in the law [Section 50] for ascertaining claims—(1) The judgment of a Court (against the corporation, of course)—and (2) proof to the satisfaction of the Comptroller—(not in a Court of Equity on a proceeding by the Receiver.)

The "*necessity*" for enforcing the individual liability of stockholders can only arise from the legal ascertainment of the value of the assets, as compared with the amount of the debts of the corporation, which debts must be ascertained in the manner fixed by the law; and this "*necessity*" can be known to the Receiver, whose duty it is to enforce the liability, only from the report of the Comptroller, after the claims have been presented and proved according to the law. The Receiver, therefore, cannot proceed to enforce the individual liability, *until* he has converted the assets into money, and the dividend

of creditors has been ascertained by the Comptroller of the Currency, if there be not enough to pay in full.

As soon, however, as that dividend has been ascertained, the sum due by each shareholder to make up the deficiency is thereby fixed, and becomes a liquidated sum, which the Receiver can proceed to recover in a Court of law against each shareholder, and the District Attorney has the respensibility of conducting the proceedings.

Thus are all the inconveniences complained of on both sides, avoided; no inconsistent accounts can be passed by different Courts of Equity; no account can be taken without proof of the claims of creditors; and there can be no failure of justice on account of the impossibility of making proper parties without ousting the jurisdiction of the Court.

The law having given to the Comptroller the power to state the account, make distiribution, and ascertain the deficency, has thereby taken that power away from all Courts of Equity, and has left a simple cause of action for a liquidated sum to be enforced by the Receiver against each stockholder in a Court of Law.

V. The complainant has no standing in a Court of Equity, because the powers of a Court of Law are sufficient.

None of the reasons for, and none of the advantages of, the Equity proceeding can exist in this case.

Story Eq. Pl., sec. 472.

The complainant has stated himself out of the Equity Court by his averment, *that the balance of indebtedness of the Bank, after applying the assets, exceeds the whole amount of its capital stock.* For it follows, of course, that the sum due by each stockholder is fixed, and no account is necessary.

Story Eq. Pl., sec. 479.

If, on the failure of the Bank, and the appointment of a Receiver, and the lapse of ten days without an application for an injunction under the proviso in section 50, the effect of the

law is to put an end to the Bank's existence as a corporation, so that it cannot be made a party to a suit in equity, then it is apparent that the law did not contemplate such a proceeding in Equity as the present.

Story vs. Freeman, 25 N. Y., 215—Report of referee.

I. NEVETT STEELE,
THOMAS DONALDSON,
For Appellees.